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In The

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MELISSA WHITING,

Petitioner,

v.

UNIVERSITY OF
SOUTHERN MISSISSIPPI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

JAMES A. KEITH
JOHN S. HOOKS
Counsel of Record
IAN C. JONES
ADAMS AND REESE LLP
111 E. Capitol Street,
Suite 350
Jackson, Mississippi
39225
Telephone: 601-353-3234
Facsimile: 601-355-9708

LEE P. GORE
University Counsel
THE UNIVERSITY OF
SOUTHERN MISSISSIPPI
Southern Station Box 10051
Hattiesburg, Mississippi
39406
Telephone: 601-266-5725
Facsimile: 601-266-6323

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did Dr. Melissa Whiting, a non-tenured faculty member at the University of Southern Mississippi, have a federally protected property interest in tenure or promotion? Even if Dr. Whiting did have a property interest protected by federal due process, did the Defendants violate her property interest?

2. Has Dr. Whiting demonstrated the circuit court misapplied its equal protection analysis, creating a split among circuits?

3. Has Dr. Whiting offered any evidence rebutting testimony showing the decision regarding her application was fair, impartial, and based on constitutionally permissible reasons?

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INTRODUCTION

Dr. Melissa Whiting, a former non-tenured faculty member at the University of Southern Mississippi, filed this suit in state court following denial of her application for tenure and promotion. Dr. Whiting alleges the denial arose from ill will between her and her department chair, Dr. Dana G. Thames, the daughter of the University President, Dr. Shelby F. Thames. Dr. Whiting argues the decision of President Thames denying her tenure and promotion was motivated by the alleged ill will between her and Dr. Dana Thames. Dr. Whiting offers nothing, however, to rebut the testimony of President Thames that he was unaware of alleged unconstitutional motives and made the decision to deny her application for reasons related to her insufficient publication record.

After removal, both the district court and the circuit court determined that Whiting could not maintain her claims under federal law because she 1) had not established a property interest in tenure or promotion, 2) had not demonstrated a lack of rational basis necessary to maintain a "class-of-one" equal protection claim, and 3) had not rebutted the testimony of the University's president showing a rational basis for his decision. Dr. Whiting does not include in her petition the circuit court's decision denying her claim of a violation of liberty interest or the decision denying her First Amendment retaliation claim.

STATEMENT OF THE CASE

I. Facts

In September 1996, the Board of Trustees of the State Institutions of Higher Learning approved the employment

of Melissa Whiting as an assistant professor in the Department of Curriculum, Instruction, and Special Education in the College of Education and Psychology at The University of Southern Mississippi. Dr. Whiting was hired under a nine-month contract effective August 21, 1996, and extending until May 22, 1997. R. 381-83. The Board, in May 1997, approved Dr. Whiting for tenure-track status, effective August 21, 1996. R. 385-87. In addition to the 1996-97 contract, the Board and Dr. Whiting executed five successive nine-month contracts for academic years 1997-98, 1998-99, 1999-2000, 2000-01, and 2001-02. R. 389-93. Each contract identifies the parties (the Board of Trustees and Melissa Whiting), the term of employment (a nine-month period), and the annual salary. *Id.* The contracts state they are subject to the "laws of the State of Mississippi and the policies and by-laws of the Board." *Id.*

In August 2001, at the beginning of her sixth year at the University, Dr. Whiting asked the University to consider her for tenure and for promotion to associate professor. R. 395-96. Dr. Whiting submitted her credentials in the form of a "dossier." *Id.* An academic dossier is a collection of materials required to be assembled and submitted by each candidate for tenure and promotion. R. 422. The dossier contains documentation demonstrating suitability for tenure and promotion. *Id.* The required format for tenure and promotion dossiers is set out in a publication of the College of Education and Psychology entitled "Policy and Procedures for Tenure and Promotions." *Id.* The procedures require that each candidate submit documentation about her work in the areas of teaching, scholarship and publication, and service activities. *Id.*

By the time Dr. Whiting's dossier reached the President, at least twenty-nine people had participated in the

review of Dr. Whiting's dossier. Fifteen recommended against tenure, twelve recommend in favor of tenure, and two recused themselves or abstained. Fourteen recommended in favor of promotion, twelve recommended against promotion, and three recused themselves or abstained. University President Shelby F. Thames decided against tenure and promotion. The specific process regarding Dr. Whiting's application for tenure and promotion is summarized below.

A. The Department Level

1. The Tenure and Promotion Committee

First, a committee of faculty from the Department of Curriculum, Instruction, and Special Education met on September 28, 2001, to consider Dr. Whiting's application for tenure and promotion. According to the summary report of this meeting, "some questions" arose during the committee's deliberations about "various articles in [Dr. Whiting's] publication section" of her dossier. R. 424. The committee "decided to delay consideration of her tenure and promotion requests until Dr. John Davis, Committee Chair, and Dr. Dana Thames, Department Chair, had the opportunity to meet jointly with Dr. Whiting to request a written response to these questions about various articles in her publication section (as per procedures in the Faculty Personnel Action, XI-17, item 13.4)." *Id.*

Dr. Whiting submitted a written response to the committee. R. 426-27. "Dr. Melissa Whiting's response to Dr. Davis [sic] and Dr. Thames [sic] 'Data Questions.'" In her response, Dr. Whiting gave her explanation of the "methodology and analysis" she used to write several published articles. *Id.*

The Department's tenure committee reconvened on October 2, 2001. Dr. Davis distributed Dr. Whiting's written response. R. 429-30. According to the written summary of the committee's meeting of October 2, 2001: "Questions remained, however, about discrepancies in the raw data of the two published articles and about the similarities between the two published articles, the one in *FOCUS: Teaching English Language Arts* and the one in *Journal of Research in Rural Education*." *Id.* According to the committee's report:

> Extensive discussion related to Dr. Whiting's request for promotion took place. The discussion seemed to indicate that there were mixed opinions about Dr. Whiting's research/scholarly performance. There were questions about whether Dr. Whiting met the criterion for promotion related to consistently demonstrating quality performance in research/scholarly activities, making it questionable whether a rating in this area could be labeled satisfactory or higher, as specified in the *College of Education and Psychology: Policy and Procedures for Tenure and Promotion*, January 1997, pages 8-11.

Id.

The report also indicates similar concerns about Dr. Whiting's application for tenure. *Id.* Although the committee "felt her teaching and service were good," there were concerns "about Dr. Whiting's consistent availability to advise students and about her sporadic attendance at meetings." *Id.*

The committee, voting by secret ballot, decided to award Dr. Whiting a promotion. The vote was six in favor

of promotion, three against promotion, and two abstentions. *Id.*

Next, the committee considered Dr. Whiting for tenure. "It was pointed out," states the report, "that IHL guidelines and Faculty Handbook indicate that tenure occurs between the completion of five and seven years of continuous service to the university." *Id.* According to the summary report: "There was general agreement that Dr. Whiting should not request tenure until *completion* of her sixth year." *Id.* (emphasis in original); *see also* R. 452, Excerpts of Faculty Handbook, § X (4.7) (explaining that a tenure candidate may request a deferral of the tenure process until the seventh year of contracted employment). The Department committee voted against awarding tenure. *Id.* Six members voted against awarding tenure, four voted in favor, and one abstained. *Id.*

By two separate letters dated October 2, 2001, Dr. Davis, the committee chair, notified Dr. Whiting of the results of the promotion and tenure process. R. 492-94. The letter regarding tenure explained the committee's "considerable concerns" regarding Dr. Whiting's "research/scholarly performance." R. 494. The letter also stated that Dr. Whiting had

> the option of continuing in the process, or withdrawing [her] request for early tenure, at this level or any of the subsequent levels of consideration. The vote of the Committee seems to indicate that you might want to consider withdrawing your request at this time, because you have until the end of the seventh year to attain tenure. The final decision about continuing the process rests with you.

Id.

2. The Department Chair

By two separate letters dated October 4, 2001, Dr. Dana Thames notified Dr. Whiting about the committee's determination. R. 496-98. According to University policy, Dr. Dana Thames also prepared a written recommendation to Dr. Carl Martray, Dean of the College of Education and Psychology, regarding the recommendations of the Department committee's report. R. 500-03; R. 461, Excerpts of Faculty Handbook, § XI (8.1). According to the letter written by Dr. Dana Thames to Dean Martray, Dr. Whiting "***requested that her materials be moved forward and reviewed for both Tenure and Promotion to Associate Professor rank.***" R. 500-03. (bold and underline in original). *See also* R. 474-75, Excerpts of Faculty Handbook, § XI (13.5) (requiring Department Chair to "prepare independent written recommendations either concurring or disagreeing with the recommendations of Tenure Committees").

Dr. Dana Thames agreed with the Department's report "indicating that Dr. Whiting's progress toward the attainment of tenure is negative at this time and borderline at the present for promotion." R. 500. According to Dr. Thames' letter:

> In summary, I feel that Dr. Whiting's progress toward tenure and promotion is marginal at the present time. In my opinion, it would be in Dr. Whiting's best interest for her to withdraw her papers from tenure and promotion consideration at this time, because she has until the end of her seventh year to acquire tenure, and promotion may be requested at the beginning of any academic year. I make this recommendation because I believe that she has the potential to overcome the concerns of departmental peers. . . .

R. 501-02. A copy of this letter was mailed to Dr. Whiting. R. 503.

B. The College Level

1. The College Advisory Council

Notwithstanding the report of the Department committee and the recommendation of the Department chair, by e-mail dated October 12, 2001, Dr. Whiting indicated her desire to move her tenure and promotion application to the College Advisory Committee ("CAC"). R. 506.

The CAC, consisting of representatives from each department of the College of Education and Psychology, met to consider Dr. Whiting's tenure and promotion dossier on October 30, 2001, and November 7, 2001. R. 508-16. According to the tenure and promotion reports, the CAC conducted a "full and detailed discussion" of Dr. Whiting's dossier with awareness of the promotion and tenure guidelines of the Faculty Handbook. *Id.*

The CAC reviewed Dr. Whiting's dossier, the letter written by Dr. Dana Thames to Dean Martray dated October 10, 2001 (R. 500-03), and "a letter of rebuttal" submitted by Dr. Whiting to the CAC. R. 508-16. *Id.* The letter submitted by Dr. Whiting, eleven pages in length, challenges the recommendations of the Department committee and the recommendations contained in the letter written by Dr. Thames dated October 10, 2002. R. 518-27.

The CAC acknowledged the "disparity between the annual evaluations conducted by the various department chairs of Dr. Whiting's department and the report and recommendations of the promotion and tenure committee and the clarifications of the current department chair." R.

508-16. "The annual evaluations tended to be quite positive, while the report of the tenure and promotion committee was more negative."[1] *Id.* After examining the "credentials objectively and mak[ing] separate evaluations of Dr. Whiting's credentials contained in the dossier," the "CAC consensus was that it appeared that the annual evaluations of the chairs in the past were more optimistic than the credentials justified during many of the years." *Id.* According to the CAC:

> In considering Dr. Whiting's publication credentials, the CAC was concerned that there appeared to be a small number of refereed publications (three) and some publications were not in strong refereed journal outlets or represented contributions to invited publications (annotated bibliographies). A number of the publications contained in Dr. Whiting's vita were clearly published prior to her hire at USM (for example a book). Since her hiring at USM, it appears that she has published primarily annotated bibliographies. There is mention of a book chapter, but no documents in the dossier to substantiate the contract for that chapter. Although there is considerable debate in the dossier about Dr. Whiting's research efforts (her rebuttal/clarification letter and the Department Chair's letter), the consensus of the CAC members was that the research activity shown at this time, whether considered qualitatively or quantitatively, was not adequate and did not meet college research standards.

Id. at p. 2.

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[1] Consistent with University policy, Dr. Whiting had received annual evaluations from her Department chairs.

The CAC voted to deny Dr. Whiting tenure and promotion. The votes regarding tenure and promotion, although conducted separately, were identical in outcome: four against, two in favor, and zero abstentions. *Id.*

2. The Dean of the College

Dr. Carl Martray, Dean of the College of Education and Psychology, then reviewed Dr. Whiting's dossier for tenure and promotion as required by University policy. R. 529. Dr. Martray concluded that "after a thorough review of the recommendations of the CAC and the issues raised by the committee as well as a review of the portfolio materials submitted, I can find no compelling reason to recommend against the recommendations of the CAC." *Id.* Dr. Martray transmitted Dr. Whiting's application materials to the Provost without recommending either promotion or tenure. *Id.*

By letter dated November 27, 2001, Dean Martray notified Dr. Whiting of his decision, enclosing copies of the CAC reports. R. 532. Dr. Martray reminded Dr. Whiting that: "Upon receipt of this letter, you have the options of withdrawing your application for tenure and promotion and requesting that the recommendation be deferred to the seventh year (as recommended by your chair and departmental committee) . . . " *Id.* Dr. Whiting did not withdraw her dossier from consideration. According to the tenure and promotion policy, the Provost sought input from the University Advisory Council. R. 481.

C. The University Level

1. The University Advisory Council

The University Advisory Council ("UAC") met on at least two occasions to consider Dr. Whiting's dossier. R. 534-36. The UAC met on March 27, 2002, and on April 11, 2002. *Id.* Dr. Whiting was invited to attend the meetings but declined to attend on the advice of her attorney. R. 535, 536. Dr. Whiting did present a letter to the members of the UAC, however, alleging "prejudicial failures of due process" and violations of due process rights under the Fourteenth Amendment. R. 538-39. The UAC invited a number of witnesses to appear before the UAC: Dr. Carl Martray, Dr. Dana Thames, Dr. Carolyn Reeves-Kazelskis, and Dr. John Davis. R. 534-36.

According to the report of the UAC, dated April 24, 2002: "The concerns expressed by the department and college committees, chair, and dean pertaining to Dr. Whiting's research productivity and record of service were discussed at length. The UAC shared many of their concerns related to research, but found the area of service as documented to be more than adequate." R. 540-41. The UAC ultimately voted in favor of awarding tenure to Dr. Whiting. The vote was five in favor of tenure, three against, and one recusal. *Id.* Regarding promotion, the UAC did not reach a definitive conclusion, with four voting in favor, four voting against, and one recusal. *Id.* As Dr. Whiting's dossier moved forward to the Office of the Provost, Dr. Whiting supplemented her dossier again. R. 543.

2. The Provost

Dr. Anselm Griffin, then Provost, concurred with the recommendation of the UAC to grant Dr. Whiting tenure.

By letter to Dr. Whiting dated May 17, 2002, Dr. Griffin indicated that he was "recommending to President Shelby F. Thames that you be granted tenure as a faculty member. . . ." R. 545-46. Although the UAC reached a tie regarding its vote for promotion, Dr. Griffin recommended promotion. *Id.*

D. The President

After carefully reviewing Dr. Whiting's credentials, University President Dr. Shelby Thames mailed Dr. Whiting two letters by Federal Express dated August 23, 2002, to her addresses in Petal, Mississippi, and Vinita, Oklahoma. R. 548-49. These letters, identical except for different addresses, requested a meeting with Dr. Whiting to discuss his concerns about her tenure application:

> I would like to discuss this matter with you prior to making my decision. I can meet with you on Tuesday, August 27, at 9:00 a.m. If you are unable to meet on Tuesday, I invite you to schedule a telephone conference. Please contact Ms. Polly Odom at 601-266-5301 to confirm a meeting on Tuesday or to schedule a telephone call.

Id.

Dr. Whiting chose not to meet with President Thames (in person or by telephone) to discuss his concerns about Dr. Whiting's tenure and promotion application. R. 551. Accordingly, President Thames wrote Dr. Whiting another letter on August 30, 2002, stating:

> I am disappointed that you did not take advantage of my invitation to meet with me and/or talk with me via conference call to discuss your tenure and promotion. This was an opportunity for

> you to talk with me about some of the issues raised during this process, and thus, I would have preferred to hear from you personally before making a decision.
>
> I have reviewed your tenure and promotion dossier and all the related materials. My conclusion is that I will not recommend to the Board of Trustees that you be granted tenure or promotion at The University of Southern Mississippi.
>
> This letter constitutes notice of non-renewal of your employment at USM. A contract of employment will not be offered to you after this academic year ending in May 2003.

Id.

E. The Board of Trustees

Dr. Whiting appealed the decision of President Thames to the Board of Trustees on September 16, 2002. R. 553.

On November 11, 2002, Dr. Thomas D. Layzell, then Commissioner of Higher Education, sent Dr. Whiting's request for an appeal to the Board. Commissioner Layzell recommended the Board decline to consider the appeal. R. 573.

After discussing Dr. Whiting's request for an appeal in executive session during its meeting of November 21, 2002, the Board of Trustees declined to consider Dr. Whiting's appeal. The Board unanimously denied review of the President's decision regarding promotion and tenure because Dr. Whiting had already filed suit on August 6, 2002 – even before the President had made his decision. R. 575-78. The Board notified Dr. Whiting of its decision by letter to her attorney dated November 21, 2002. R. 580.

II. Procedural History

On August 6, 2002, Dr. Whiting filed a complaint against the University and Drs. Shelby F. Thames, Carl Martray, and Dana G. Thames alleging damages arising from the tenure and promotion process. The complaint, filed originally in the Circuit Court of Forrest County, Mississippi, seeks several forms of relief, including damages in the amount of $5,000,000.00. The individual defendants are named in both their official and personal capacities. R. 568-71, Original Complaint.

The Defendants timely removed the complaint to federal court. The district court denied Dr. Whiting's motion to remand. Whiting amended her complaint on March 10, 2003, naming the Board of Trustees of Mississippi's Institutions of Higher Learning as an additional defendant.

Dr. Whiting alleges violations of her constitutional rights under the Civil Rights Act, 42 U.S.C. § 1983. She claims the Defendants deprived her of substantive and procedural due process, as well as rights protected by the Equal Protection Clause and the First Amendment. Under state law, Dr. Whiting alleges breach of contract and "nepotism." In addition to her claims for "compensatory and actual" damages of $5,000,000.00, Dr. Whiting seeks punitive damages, "appropriate injunctive relief," and "all relief to which she is entitled pursuant to 42 U.S.C. § 1983 *et seq.* to include attorneys fees." *Id.*

The district court granted the Defendants' motion for summary judgment with respect to all federal claims and remanded Dr. Whiting's state-law claims to state court. Dr. Whiting appealed the award of summary judgment and appealed the district court's decision to remand the state-law claims to state court. A three-judge panel of the Fifth

Circuit unanimously affirmed the district court. *See Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 349 (5th Cir. 2006).

REASONS WHY THE PETITION SHOULD BE DENIED

I. Dr. Whiting failed to state a cognizable equal protection claim.

A. The Fifth Circuit did not err in applying *Village of Willowbrook v. Olech*.

Dr. Whiting's analysis of equal protection is confusing. At the outset, she invokes this Court's standard articulated in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), requiring the plaintiff to show "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Petition, p. 9 (citing *Olech*, 528 U.S. at 564). Then, on the next page, Dr. Whiting criticizes the circuit court for holding that "Dr. Whiting must, in addition to the foregoing *Olech* standard, also establish or negate whether there was any rational basis for the government's action." Petition, p. 10. This is illogical. The rational basis test applied by the Fifth Circuit is not "in addition to" the *Olech* test – it is the exact standard mandated by *Olech*.

Next, Dr. Whiting criticizes the circuit court for not requiring Dr. Whiting to "show that the defendant's conduct was motivated by animus and that the state's proffered 'rational' reason was pretextual." Petition, p. 14 (quoting *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944-48 (9th Cir. 2004)). She criticizes the Fifth Circuit for *not* requiring Dr. Whiting to prove animus rather than simply a lack of

rationality. Dr. Whiting appears to want to replace this Court's objective *Olech* standard with a subjective one.

Regardless of Dr. Whiting's understanding, the Fifth Circuit correctly applied *Olech*. In *Olech*, this Court confirmed that a plaintiff need not show ill will or animus so long as she proves there is no rational basis for a difference in treatment among similarly situated persons. *Olech*, 528 U.S. at 564. (This, of course, assumes the equal protection claim is not based on membership in a protected class like race, religion, or gender).

The circuit court assumed *arguendo* that Dr. Whiting had met her burden of establishing different treatment of similarly situated individuals, and then determined whether there was no rational basis for the decision to deny tenure. *Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 349 (5th Cir. 2006).[2] The Fifth Circuit correctly applied the rational basis test of *Olech* and did not "require proof of motive." In applying the rational basis test, however, the Fifth Circuit necessarily addressed Dr. Whiting's own allegation that the "rational reasons put forth by the defendants are no more than pretext for the underlying, irrational reason for her denial of tenure, i.e., President Thames's purported bias against her as a result of the ill will his daughter Dr. Thames, bore her." *Whiting,* 451 F.3d at 350.

The Fifth Circuit concluded that "[a]ll decisions were at least debatable, and none reveals a failure to exercise

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[2] Dr. Whiting misstates the Defendants' position by arguing that "the Defendants have conceded that they applied a different standard to Dr. Whiting than every other person who has been tenured and promoted." Petition, p. 8. The Defendants' position is better stated by the Fifth Circuit. *See Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 349 (5th Cir. 2006).

professional judgment." *Id.* (quoting *Levi v. Univ. of Tex. at San Antonio*, 840 F.2d 277, 280 (5th Cir. 1988)). The circuit court did not require Dr. Whiting prove ill motive, ill will, or animus. Rather, the court necessarily considered whether there was evidence of ill will because of Dr. Whiting's own allegations that rational reasons given by the Defendants were a pretext for ill will and animus. The circuit court did not err in its analysis.

B. There is no split of authority among the circuits with respect to *Olech*.

The survey of cases offered by Dr. Whiting as evidence of a split among circuits in interpreting *Olech* is protean and difficult to follow. But one thing is clear: Nowhere does Dr. Whiting show how the circuit court's decision creates a split among circuits regarding the application of *Olech*. As set out above, the circuit court correctly applied the rational basis test articulated in *Olech*, considering the issue of motive and ill will only because they were offered by Dr. Whiting as evidence of a lack of a rational basis for the University's alleged difference in treatment.

II. Dr. Whiting had no property interest warranting due process protections.

Dr. Whiting's Complaint is vague with regard to whether she claimed a property interest in tenure and promotion, in the tenure and promotion procedures, or both. Regardless, Dr. Whiting has no federally protected property interest in either.

A. Dr. Whiting has no federally protected property interest in a grant of tenure or promotion.

The "threshold requirement of any due process claim, be it substantive or procedural, is a showing that the government deprived the plaintiff of a liberty or property interest." *Pruett v. Dumas*, 914 F. Supp. 133, 137 (N.D. Miss. 1996) (citing *Moore v. Miss. Valley State Univ.*, 871 F.2d 545, 548 (5th Cir. 1989); *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988)). Unless a plaintiff can show deprivation of a protected liberty or property interest, "no right to due process can accrue." *Pruett*, 914 F. Supp. at 137.

1. Under Mississippi law, Dr. Whiting, a non-tenured faculty member, has no property interest in obtaining a grant of tenure or promotion triggering federal protection.

Whether Dr. Whiting had a protected property interest entitling her to substantive or procedural due process in gaining tenure or promotion first depends on state law. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 566-67 (1972). Once a property interest is found to exist under state law, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978).

In *Roth*, a non-tenured faculty member at a state university was employed under a one-year contract that was not renewed. 408 U.S. at 566-67 (1972). Roth was not provided a hearing to challenge the merits of the decision not to rehire him. Roth claimed he had a property interest

in being rehired and the state had deprived him of that property interest without due process. *Id.* at 568. This Court disagreed, finding Roth had no property interest triggering due process protection. *Id.*

In reaching its decision, the Court first looked to state law to determine whether a state employee has a property interest in his or her job. *Id.* at 577. Under Wisconsin law, Roth had no protected property interest in being re-employed with the university. Roth – a non-tenured professor – was statutorily entitled to nothing beyond his one-year appointment. *Id.* at 577.

Here, whether Dr. Whiting has a protected property interest entitling her to substantive or procedural due process in gaining tenure or promotion depends first on Mississippi law. The Mississippi Supreme Court has consistently said a non-tenured professor has no property interest in continued employment. In *Wicks v. Mississippi Valley State University*, 536 So.2d 20, 23 (Miss. 1988), Dr. David Wicks, a professor of history and social studies at Mississippi Valley State University, applied for tenure in 1983. The president of the university, after reviewing the recommendations resulting from the tenure process, decided to deny tenure to Dr. Wicks based on lack of credentials in the teaching field. *Id.* Dr. Wicks filed suit alleging due process violations.

Relying on *Roth*, the Mississippi Supreme Court, as part of the first step in its due process analysis, examined Mississippi law to determine if Dr. Wicks had a property interest warranting due process protections. *Id.* at 22. The Supreme Court determined that Miss. Code Ann. § 37-101-15, setting forth the general powers and duties of the Board of Trustees of the State Institutions of Higher

Learning, and subsections 37-101-15(b) and (f), granting authority to the Board of Trustees for general supervision of all matters incident to the proper functioning of universities and for the employment of professors, do "not create a legitimate expectation of continued employment for a non-tenured employee." *Wicks*, 536 So.2d at 22. "There is no property interest in the grant of tenure." *Id.* at 20.

Although the University has a written tenure policy, the policy does not give Dr. Whiting a property interest in actually obtaining tenure: "No protected interest is created by a state rule or regulation which in no substantive way limits by particularized standards the discretion of the administrator." *Id.* at 23 (citing *Olim v. Wakinekona*, 461 U.S. 238 (1982)). The president's discretionary decision to recommend tenure was not restricted by mandatory language like "shall" or "must," reflecting the principle that "the President is allowed to determine what is best for the University." *Id.* Although "Wicks was unhappy with the way that the University exercised its discretion, but that does not create in him a protected property interest." *Id.* at 23-24 (quoting *Staheli v. Univ. of Miss.*, 854 F.2d 121, 125 (5th Cir. 1988)). "As held in *Roth*, a non-tenured college teacher has no constitutionally protected property interest in his job." *Id.* at 23.

Later, the Mississippi Supreme Court affirmed *Wicks*' holding. In *Hall v. Board of Trustees of State Institutions of Higher Learning*, 712 So.2d 312 (Miss. 1998), Hall, a professor at the University of Mississippi Medical Center, had not been granted tenure by the faculty or the Board. "Therefore, Dr. Hall did not have a legitimate expectation of, nor entitlement to, continued employment at UMC, and furthermore, the renewal of Dr. Hall's contract was subject to approval of the Board." *Id.* at 321. Dr. Hall, therefore,

"did not have a protected property interest in his employment at UMC, and thus, he is not entitled to substantive protection under the due process clause as the result of the arbitrary deprivation by government action of a protected property interest." *Id.*

The point of tenure is to give tenured professors – not professors without tenure – some assurance of continuing employment. This is the point made by the Mississippi Supreme Court in *Wicks*:

> The whole purpose of the distinction between tenured and non-tenured faculty was to give the University discretion over the employment of non-tenured teachers. . . . The institution of tenure has an inexorable internal logic: **the very existence of a tenure system means that those teachers without tenure are not assured of continuing employment**. *See Board of Regents v. Roth*, *supra*, (non-tenured college teacher had no constitutionally protected property interest in his job).

Wicks, 536 So.2d at 23 (quoting *Staheli v. Univ. of Miss.*, 854 F.2d 121, 125 (5th Cir. 1988) (emphasis added)).

Wicks and *Hall* confirm that the statutory framework governing university employment and the Policies and Bylaws of the Board of Trustees do not create a legitimate expectation of continued employment for a non-tenured faculty member. Central to the Mississippi Supreme Court's reasoning in these cases is the discretion left to Mississippi's university presidents in deciding to award or deny tenure and promotion and in the Board of Trustees' ultimate authority to approve presidential recommendations. "It shall be the policy of the board to permit the executive head of each institution to nominate for election by the board all subordinate employees of the institution

over which he presides." Miss. Code Ann. § 37-101-15(f). The actions of the faculty and various committees below the level of President are advisory only, as indicated by the word "recommendations." They do not bind the President or otherwise limit him from exercising his discretion in deciding whether to recommend a faculty member to the Board of Trustees for tenure. *Wicks*, 536 So.2d at 23.

The Board Policies and Bylaws define tenure as "continuing employment that may be granted to a faculty member after a probationary period upon nomination by the Institutional Executive Officer for election by the Board." R. 169. The President's decision is the final decision for the University, unless appealed to the Board of Trustees. R. 173. Furthermore, "Board approval shall be *required* for the award of tenure." R. 168. "The award of tenure is not vested until notice of the award is given in writing by the Institutional Executive Officer, *after approval by the Board*, and the written notice is actually received by the faculty member." R. 169 (emphasis added). A candidate simply cannot create a property right to tenure or promotion simply through his or her subjective expectation of tenure or promotion.

The Faculty Handbook also shows that Dr. Whiting had no legitimate expectation of continued employment. The Faculty Handbook defines tenure as "a status that is granted to college and university faculty members *after a probationary period in the profession*. It protects them against involuntary suspension or termination of employment except upon stipulated grounds and in accordance with specified procedures." R. 171 (emphasis added). In other words, faculty who have not obtained tenure do not enjoy the protections of tenure.

Dr. Whiting essentially argues for "pre-tenure tenure." But Mississippi law is clear: "A non-tenured college teacher has no constitutionally protected property interest in his job." *Wicks*, 536 So.2d at 23. The tenure policies of the University do not "create or confer an expectation of continued employment." *Id.* at 23. If they did, "the University will have received powerful incentives to make its tenure policy less specific and therefore less helpful to [faculty] seeking to discern and fulfill the requirements for tenure." *Id.* at 24 (quoting *Staheli*, 854 F.2d at 126). "Whatever actual expectations [Dr. Whiting] may have had, they cannot be constitutionally baptized a 'legitimate claim of entitlement' to permanent employment." *Id.* Dr. Whiting does not have a property interest triggering due process protections, and her federal due process claims were, therefore, appropriately dismissed.

2. Just as Dr. Whiting has no property interest in tenure or promotion, she has no property interest in the University's tenure and promotion procedures themselves.

Although *Wicks* and *Hall* confirm that a non-tenured faculty member has no property interest in tenure or promotion, Dr. Whiting attempts to circumvent these cases by claiming the University's written tenure and promotion policy contained in its Faculty Handbook are part of her one-year contract, providing procedural rights that warrant federal due process protections. But Dr. Whiting never accounts for the fact that in *Wicks* and *Hall* the Mississippi Supreme Court was construing *written* tenure policies promulgated by the Board of Trustees of State Institutions of Higher Learning – the same board that promulgated the

policy at issue in this case. In *Wicks* and *Hall,* the Mississippi Supreme Court held that the written tenure policies of two of Mississippi's public universities (Mississippi Valley State University and The University of Mississippi, respectively) did not afford due process protections. Nevertheless, Dr. Whiting contends the procedures entitle her to special due process protections Mississippi's highest court has never before discovered. This is not so.

The University does not dispute that its Faculty Handbook may well become part of an employment contract, according to the Mississippi Supreme Court's holding in *Robinson v. Board of Trustees*, 477 So.2d 1352 (Miss. 1985). But even if the tenure and promotion procedures became part of the non-tenured employment contract Dr. Whiting held while applying for a tenured position, this does not mean the procedures are a right protected by the federal constitution. As explained above, the determination of whether there is a property interest protected by federal law is a two-step inquiry. Assuming Dr. Whiting has satisfied the first step – that the procedures are part of a contract in which she has a property interest – she must then satisfy the second step: whether under "federal constitutional law . . . that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978).

Federal courts answering this question have repeatedly held that unless a public employee has a legitimate property right to an employment position, the procedures used in evaluating his or her suitability for the position do not create property rights protected by the due process clause of the Federal Constitution. According to the Fifth Circuit: "The existence of such procedures cannot be used as a bootstrap to aid the finding of an entitlement." *Evans v. City of Dallas*,

861 F.2d 846, 850 (5th Cir. 1988) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)).

In *Mumford v. Godfried*, 52 F.3d 756, 759 (8th Cir. 1995), Mumford, a university professor, brought an action against a state university and faculty administrators alleging he was wrongfully denied tenure. He focused on the language in the university's faculty handbook regarding procedures to be followed by each department in making tenure decisions. *Id.* Mumford argued that the university's "written rules governing tenure decisions 'constitute an integral part of the contractual structure defining the employment relationship and, thus constitute a valid contract.'" *Id.* Because he had a contractual right to have certain procedures followed, Mumford argued, he also had a property interest in those procedures triggering due process protections. *Id.* The Eighth Circuit disagreed "for the simple reason that a contractual right to have certain procedures followed does *not* create a property interest in the procedures themselves." *Id.* (emphasis in original). The district court's summary judgment dismissal of Mumford's due process claim was therefore affirmed.

Other courts agree that employment procedures do not give rise to federally protected due process interests: "There is neither a 'liberty' nor a 'property' interest in procedures themselves." *Fleury v. Clayton*, 847 F.2d 1229, 1231 (7th Cir. 1988) (citing *Olim v. Wakinekona*, 461 U.S. 238, 248-51 (1983)); *see also Richardson v. Township of Brady*, 218 F.3d 508, 518 (6th Cir. 2000) (holding that the plaintiff "can have no protected property interest in the procedure itself"); *Bautista v. Crowley*, 108 F.3d 1384, 1384, 1997 WL 120827 (9th Cir. 1997) (unpublished) (holding that alleged failure of university to follow employment procedures is not a violation of due process,

because "this approach mistakes the 'procedure' with the 'right' being protected. To recognize a constitutionally protected interest in the procedures themselves . . . would stand the due process analysis on its head. . . . Appellant cannot have a property interest in process alone.") (citations omitted)); *Batra v. Bd. of Regents of The Univ. of Nebraska*, 79 F.3d 717, 720 (8th Cir. 1996) ("The University's alleged failure to follow its own procedural rules and regulations did not, without more, give rise to a protected liberty or property interest."); *Dube v. The State Univ. of New York*, 900 F.2d 587, 599 (2d Cir. 1990) ("Based on the record before us, which indicates only that Dube was entitled to be considered for tenure in accordance with established contractual procedures, we conclude that Dube has failed to meet the threshold requirement of establishing a protected 'liberty' or 'property' interest."); *Campbell v. City of Champaign*, 940 F.2d 1111, 1113 (7th Cir. 1991) ("[A] contract which merely creates a right to specified procedures does not create an entitlement upon which a claim of deprivation of property without due process of law can be founded. . . . When the claimed deprivation of property is the loss of a job, the entitlement must be to a job, rather than just to a set of disciplinary procedures.").[3]

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[3] Here, the lack of a property interest in the procedures themselves is enhanced because the ultimate decision regarding tenure and promotion is made by the president and is discretionary. *See Bautista v. Crowley*, 108 F.3d 1384, 1384, 1997 WL 120827 (9th Cir. 1997) (unpublished) ("Nothing in the Department's evaluation criteria creates an expectation of entitlement to a high performance rating. To the contrary, they reserve a significant measure of discretion to UNR decision makers."); *Clemente v. United States*, 766 F.2d 1358, 1365 (9th Cir. 1985) ("If the procedures required pose no significant limitation on the discretion of the decision maker, the expectation of a specific decision is not enhanced enough to establish a constitutionally protected interest in the

(Continued on following page)

No matter how Dr. Whiting tries to characterize her claim, as a matter of law, she has no property interest protected by due process.

B. Because the circuit court assumed the existence of a property right for its analysis, no property right was "ignored."

In analyzing her due process claims, the Fifth Circuit first rejected Dr. Whiting's argument that she had an "expectation of continued employment sufficient to generate a protected property interest." *Id.* at 344-45. The Fifth Circuit also rejected Whiting's claims that positive performance reviews (either annual evaluations or a third-year review) were sufficient to generate a property interest in tenure. *Id.* (citing *Wicks*, 536 So.2d at 24). According to the Fifth Circuit:

> Language in the Faculty Handbook ... consistently reiterates that promotion and tenure are not guaranteed, even by positive performance reviews: the Handbook states, for example, "[p]romotion in academic rank is not guaranteed by contracted employment or earned solely by the duration of employment" and "[t]he privilege of tenure is not guaranteed by tenure-track appointment, by prior academic rank, or by duration of employment." Further, as the district court noted: "the same faculty handbook reiterates that, notwithstanding the

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procedures.")). As set out above, the Mississippi Supreme Court has confirmed the discretion of university presidents in making tenure and promotion decisions: "It is well recognized that the final decision to grant tenure lies with the President, and the grant of tenure is discretionary. The President is allowed to determine what is best for the University." *Wicks*, 536 So.2d at 23.

> procedures, tenure is awarded at the discretion of the board of trustees upon nomination by the president." Given such language and existing state law precedent, we cannot construe an expectation of continued employment sufficient to generate a protected property interest.

Whiting, 451 F.3d at 345.

According to the Fifth Circuit, "Where a tenure policy exists, non-tenured university employees under Mississippi law do not have a property interest in their continued employment that warrants protection under the due process clause." *Id.*

This determination was entirely consistent with the district court's earlier ruling that "the procedures set out in the faculty handbook" do not perform "the necessary alchemy of transforming her expectations into protectable interests. That argument in my opinion founders . . . because the same faculty handbook reiterates that, notwithstanding the procedures, tenure is awarded at the discretion of the board of trustees upon nomination by the president." (*See* Exhibit "A," to Appellees' Brief, Excerpt of Transcript of Hearing).

The Fifth Circuit then determined whether "some other property interest in a benefit afforded by her current contract with the state university" could give rise to a protected property interest. *Whiting,* 451 F.3d at 345. The court acknowledged that in Mississippi an employee manual becomes part of an employment contract, "creating contract rights to which employers may be held, such as Dr. Whiting's right to the procedures outlined in the handbooks." *Id.* at 13 (citing *Robinson v. Bd. of Trustees,* 477 So.2d 1352, 1353 (Miss. 1985); *Bobbitt v. The Orchard Dev. Co.*, 603 So.2d 356,

361 (Miss. 1992)). But the court did not conclude that Dr. Whiting's contractual rights were sufficient to give rise to a property interest warranting due process protection under federal law – the second step in the inquiry.

Instead, showing deference to Dr. Whiting, the Fifth Circuit *assumed* the existence of that right for purposes of its analysis: "However, even if Dr. Whiting's contractual rights are sufficient to constitute a property interest warranting due process protection, it is not clear she has adequately alleged any sort of deprivation." *Whiting*, 451 F.3d at 346. The court then examined each alleged breach of the Faculty Handbook: (1) the timeliness of the decision regarding promotion and tenure, (2) the fact that Dr. Whiting was not granted tenure despite the positive evaluations, and (3) the idea that Dr. Whiting was entitled to *de facto* or automatic tenure in light of the annual and third-year evaluations. *Id.*

The Fifth Circuit ultimately concluded that these alleged breaches of the tenure and promotion procedures did not "establish a genuine question of material fact as to whether she has been deprived of any property interest. Accordingly, her due process clause claims, both substantive and procedural, fail insofar as they are based on deprivation of a property interest." *Id.*

Dr. Whiting claims the court ignored her protected property interest. But the circuit court assumed the existence of the property interest for purposes of its due process analysis, ultimately concluding that no due process violation occurred even if Dr. Whiting had a property interest. The issue, then, of whether the circuit court erred in its determination that Dr. Whiting did not have a property interest protected by federal law is moot.

II. Dr. Whiting offered no proof of a biased decision maker.

Dr. Whiting claims President Shelby Thames was biased in making his decision regarding her tenure and promotion application because of 1) the lawsuit Dr. Whiting had earlier filed against him and 2) the alleged animosity between Dr. Whiting and President Thames' daughter, Dr. Dana Thames, the Chair of the Department in which Dr. Whiting worked.

There is no evidence that President Thames' decision was motivated or informed by constitutionally impermissible motives. *See Whiting*, 451 F.3d at 351. The President reviews *de novo* all recommendations arising from departmental, college, and Provost or vice presidential levels. R. 482, 449, Excerpts of Faculty Handbook, § XI (22), § XI (3.3). President Thames swore in his affidavit that, before making his decision, he never discussed Dr. Whiting's tenure and promotion application with his daughter, Dr. Dana Thames. R. 612-13. President Thames based his decision not to award tenure on his own careful and independent review of Dr. Whiting's dossier. *Id.* The basis of his decision – that Dr. Whiting had not sufficiently complied with the publication requirement for tenure and promotion – is constitutionally permissible. *Krystek v. The University of Southern Mississippi*, 164 F.3d 251, 253-54 (5th Cir. 1999); *Wicks,* 536 So.2d at 20-22. Dr. Whiting offers no proof to rebut President Thames' testimony.[4]

[4] In fact, the basis of President Thames' decision as set out in his affidavit testimony is ignored by Dr. Whiting who says, in her Petition, that "Shelby Thames provided no rationale for his decision. He referred to not one iota of some deficiency regarding Dr. Whiting's performance." Petition, p. 7.

CONCLUSION

All Defendants respectfully request the petition be denied. Dr. Whiting cannot maintain her claims under federal law because she 1) has no property interest in tenure or promotion (or in the procedures regarding tenure or promotion); 2) has not demonstrated a misapplication of this Court's jurisprudence regarding her "class-of-one" equal protection claim; and 3) has not rebutted the testimony of the University's president showing a rational, constitutionally permissible basis for his decision denying tenure and promotion.

Respectfully submitted,

JAMES A. KEITH
JOHN S. HOOKS
IAN C. JONES
ADAMS AND REESE LLP
111 E. Capitol Street,
Suite 350
Jackson, Mississippi
39225
Telephone: 601-353-3234
Facsimile: 601-355-9708

LEE P. GORE
University Counsel
THE UNIVERSITY OF
SOUTHERN MISSISSIPPI
Southern Station Box 10051
Hattiesburg, Mississippi
39406
Telephone: 601-266-5725
Facsimile: 601-266-6323

Counsel for Respondents